No. 10610

In the United States
Circuit Court of Appeals
For the Ninth Circuit

JAMES GOODWIN POWELL, and ANNA STRACHAN POWELL, husband and wife,
Appellants,

vs.

PETER J. WUMKES,
Appellee.

Appellants' Opening Brief

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RECORD ON APPEAL

This proceeding is to review the decisions of the Honorable Yankwich, Judge of the United States District Court, reversing the order of the Conciliation Commissioner of San Bernardino County, dated April 9, 1943, wherein said Conciliation Commissioner made and entered his order determining the value of certain property which secured the claim of Peter J. Wumkes, and also reversing the Order of the Conciliation Commissioner made and dated May 18, 1943, wherein said Commissioner denied the Petition of Peter J. Wumkes for a rehearing of the bankrupts' Petition to determine value of real property.

The Record on Appeal contains the complete record and all of the proceedings and evidence in the above-entitled matter. (T-127). Said transcript of record is herein referred to by the letter "T" and its pages by their numbers.

JURISDICTION

The right of the Court to review the Orders of the Conciliation Commissioner has been repeatedly recognized. Perhaps one of the more recent cases on this point is Rait v. Federal Land Bank of St. Paul. (135 Fed. 2d. 447).

STATEMENT OF THE CASE

Appellants, Powell and his wife, were engaged in farming operations, to-wit, growing citrus products. The property consisted of two adjoining parcels of land, one approximately 4.2 acres in size planted to citrus trees, with a house, garage, poultry house thereon, etc., being encumbered with a Trust Deed in favor of Frank Clark, and the second parcel adjoining the Clark property consisting of approximately 5-7/8ths acres planted to citrus and encumbered by a Trust Deed in favor of Peter J. Wumkes. (T-70). (For purposes of clarity, reference to each grove hereafter will be by the use of descriptive words such as "Clark Grove or Wumkes Grove." For purposes of brevity, parties may be referred to hereafter by the use of last name, such as, "Powell, Clark or Wumkes.")

On the 25th day of July, 1940, Powells filed their Petition and schedules. (T-2-17), the debts consisting of the taxes, trust deeds on the property, a small balance on a car, but no other debts. (T-5-8). Thereafter the proceedings were referred to Hon. Fred Duffy, United States

Conciliation Commissioner for the County of San Bernardino. (T-17). Having been unable to secure acceptance or confirmation of an extension proposal, Powells then filed their amended Petition and on October 24, 1940, were adjudicated bankrupts under Section 75(s) of the Bankrupt Act. (T-18). Thereafter and on June 16, 1941, the Commissioner made his order staying proceedings for three years and fixing the rental for said property.

On December 23, 1942, Powells filed a Petition requesting reappraisal or hearing to determine value of the real property. (T-107), and on January 20, 1943, notices were mailed, to each creditor shown by the schedules, of Hearing on Petition to Determine Value of Debtors Real Property, to be heard on February 2, 1943, at ten o'clock A. M., at the Commissioner's office. (That notice of said hearing to said Peter J. Wumkes was returned with the notation "Moved, left no address"). That, however, a few days prior to the second of February, 1943, on request of attorneys for Peter J. Wumkes, said hearing was continued by the Commissioner to the 16th of February, 1943. And then another continuance was asked by Peter J. Wumkes' attorneys and on February 16th, the Commissioner took the matter off the calendar and re-set it for Wednesday, March 3, 1943, mailing new notices of hearing. (T-105). (By way of explanation, the Commissioner had received a communication from Hon. Garfield R. Jones, Supervising Conciliation Commissioner, that Peter J. Wumkes had contacted a Deputy United States Marshall who contacted Mr. Jones who then contacted Mr. Wumkes and then Mr. Jones had in writing to this Commissioner furnished the Commissioner with the then address of said Peter J. Wumkes.) (T-42).

That on the 3rd day of March, 1943, at the time and place set, appeared the debtors and their attorney, H. R. Griffin, Clark and his attorney, Henton S. Brennan, and Dr. Peter J. Wumkes and his attorney, Russell Goodwin. Prior to the hearing and before the appearance in Court of said Peter J. Wumkes, said attorney Russell Goodwin requested the Commissioner to allow him to withdraw as attorney for Peter J. Wumkes but the request was denied. Again, at the beginning of the hearing and before testimony had been offered, said Goodwin requested the Commissioner to be allowed to withdraw as attorney for Dr. Wumkes and with the consent of Dr. Peter J. Wumkes the request was granted. (T-43).

The matter then proceeded to hearing and evidence both documentary and oral were received. Dr. Wumkes was present during the taking of all testimony, and was by the Commissioner asked if he cared to examine each witness produced, was asked if he had any evidence to introduce and in each case replied in the negative and refused to ask any witness any questions or to testify himself or produce any evidence. At the close, the matter was submitted and on the 25th of March, 1943, the Commissioner rendered his decision (T-79), and mailed notice thereof (T-43-44). On April 2nd the Commissioner made his Findings of Fact and Conclusions of Law and served notice thereof, and on April 9, 1943, signed said Findings and Conclusions. (T-44).

On April 15th Clark filed a Petition for review but on May 11th withdrew such Petition. (T-57).

On April 20th, Wumkes filed a Petition for rehearing to determine value of real property. (T-36), and after notice thereof, said Petition was heard on May 18, 1943, with

Powell and his attorney, H. R. Griffin, and Petitioning Creditor Wumkes not being personally present but represented by his attorneys, Nichols, Cooper and Hickson, by Donald P. Nichols, no evidence was produced by the Petitioner. (T-24). Russell Goodwin, former attorney for Wumkes, was present and testified that the last address and only address of Wumkes that he knew was 922 E. Lugonia Avenue, Redlands, California. That Wumkes had at one time furnished him, the said Goodwin, a telephone number, Arizona 9-3551, Los Angeles, to call him at, that he, the said Goodwin, called said number on February 13, 1943, and was informed by telephone operator that no such number existed and no name listed thereunder. That said Goodwin exhibited and left with the Commission two envelopes, one bearing postmark dated February 12, 1943, and another being postmarked February 13, 1943, which said envelopes were addressed to Dr. Peter J. Wumkes, 922 E. Lugonia Avenue, Redlands, and had been returned marked "Gone, moved, left no address." (T-25. 31). On the 18th day of May, 1943, said Petition was denied. (T-34).

That various extension orders were granted and on June 11, 1943, Wumkes filed a Petition to review the Order of the Commissioner made on May 18, 1943 (T-26), and on June 11, 1943, said Wumkes also filed a Petition to review the Commissioner's Order of April 9, 1943.

Upon the hearing before the Hon. Leon R. Yankwich, the Order of the Commissioner made April 9, 1943, determining the value of the real property was reversed and the Order of the Commissioner made May 18, 1943, wherein the Commissioner denied the Petition of Wumkes for a rehearing to determine value was reversed and the matter

referred back to the Conciliation Commissioner for a further hearing, and that said Wumkes should pay as a condition precedent the sum of $50.00 to the attorney for the Powells. (T-121-122), and from this Order and judgment of the Hon. Leon R. Yankwich, this appeal was taken.

STATEMENT OF POINTS ON APPEAL

To the Above Honorable Court.

Appellants hereby designate the following points upon which they intend to rely upon said appeal, as follows:

I.

That the Honorable District Court of the United States erred in reversing the Order of the Conciliation Commissioner made and dated April 9, 1943, wherein said Concliation Commissioner made and entered his Order determining the value of certain property which secured the claim of Peter J. Wumkes.

II.

That the Honorable District Court of the United States erred in reversing the Order of the Conciliation Commissioner made and dated May 18, 1943, wherein said Conciliation Commissioner made and entered his Order denying the Petition of said Peter J. Wumkes for a rehearing of the bankrupts' Petition to Determine Value of Real Property concerned in said proceedings.

III.

That there was insufficient evidence to justify the foregoing decisions of the District Court of the United States, or either of them.

IV.

That the decisions of the District Court of the United States were contrary to the law made and propounded for such matters.

V.

That said District Court admitted and considered improper and illegal evidence in the making of said decisions, and each of them, to-wit, the admission of offer to purchase made by one Louis A. Turner, and offers by John Curci, K. C. O'Bryan, and others.

VI.

That said Honorable District Court erred in reversing the Conciliation Commissioner's Order of May 18, 1943, in that said Petition for a Rehearing of the bankrupts' Petition to Determine Value of Real Property did not state sufficient facts to warrant the granting of a rehearing of said bankrupts' Petition.

VII.

That the above said Orders of the Conciliation Commissioner were made within the discretion of said Commissioner and that said Honorable District Court erred in reversing said Orders.

ARGUMENT

Perhaps to approach this matter from a more logical basis and one from point of time, let us first discuss the Order of the District Court reversing the Order of the Conciliation Commissioner of May 18, 1943, denying the Petition of Wumkes for a rehearing of the bankrupts' Pe-

tition to determine value. So far we have not been able to find authorities bearing directly on this question but it would appear to us that the situation is very similar to a motion for a new trial. Perhaps not entirely so, for in bankruptcy matters it is not unusual and perhaps the common thing for creditors either not to appear or to appear without counsel and yet commissioners still ascertain and determine the facts as presented and render their decision.

In this case it is clearly shown that the hearing was set for February 2nd, notices mailed and at the request of the attorneys for Wumkes was continued, to February 16th, and again at Wumkes' attorneys' request continued and re-set for March 3rd, and new notices sent, then on March 3rd Wumkes and his attorney appeared and Wumkes consents to the withdrawal of his attorney. No request for a continuance is asked, no statement is made regarding notices or otherwise, the Commissioner asked if they were ready to proceed (T-46), and no negative answer was given, thereupon four appraisers of experience and standing told of their examination of the two properties both adjoining each other, presented photographs, told of water, soil, condition of the trees, houses and buildings, and gave their opinion of the value of the property. Two of the appraisers set the value of the Wumkes property at $3,900.00 and $3,600.00; the adjoining Clark property which included a house, poultry house, buildings, garage, etc., at $4,150.00 and $3,525.00; the other two appraisers set the value of the Clark property at $6,050.00 and $5,500.00. (T-74-77).

While Dr. Wumkes sat throughout the hearing without objection or request for continuance and then waiting until after the court entered its Findings and Conclusions and

Order, thus gambling on what might happen, then on the 20th day of April, nearly seven weeks after the hearing, Wumkes filed his Petition for a rehearing, not denying that he had received notice but merely alleging he had attempted to contact his attorney, Russell Goodwin, had left his phone number and had not heard from him, the said attorney Goodwin. Stated further, he believed his attorney had obtained witnesses to assist the court in determining value and the attorney had not, that he consented to his attorney's withdrawal but although afforded the opportunity he was without legal experience and did not know what questions to ask. That by mistake and excusable neglect, he was not afforded the opportunity of subpœning witnesses. (T-38).

In other words, and in brief, a motion for a rehearing on the sole ground of mistake and excusable neglect, as the affidavit itself terms it. (T-38).

"There is no such ground for granting a new trial as mistake or inadvertence, as distinguished from accident or surprise." Fincher v. Malcolmson, 96 Cal. 38, at pg. 41.

Fed. Rule of Civil Procedure, Rule 59 (a-2), 28 U. S. C. A. 723C at pg. 723: "A new trial may be granted to all or any of the parties and on all or any of the issues: (1) In jury cases . . .; (2) In actions without jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States.

The common grounds being (1) Error of law, or fact on face of record; (2) Newly discovered evidence. 3. Moore Federal Practice, pg. 3247.

Generally, to authorize the granting of a motion, the accident or surprise claimed must be such that ordinary

prudence could not have guarded against it." 20 Cal. Jur. 26.

Surprise has been defined as "Some condition or situation in which a party to a cause is unexpectedly placed, to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against." 20 Cal. Jur. 67. These principles are so generally accepted that we are not citing more specific authorities. As a general rule where surprising conditions arise upon a trial, the party whose rights are materially affected thereby should, at the earliest practicable moment, apply for such relief as will produce the least vexation, expense or delay, either by non-suit, a continuance, the introduction of other evidence or some other available mode. Such a party may not remain silent, taking his chances upon a favorable verdict, and thereafter move for a new trial. 20 Cal. Jur. 74, Schellhous v. Ball, 29 Cal. 605.

In the recent case of Barlow v. Federal Land Bank of Berkeley C. C. H. Bankruptcy Law Service, 1943 No. 54, 636 at pg. 55,739; 139 Fed. (2d) 96, the property had been appraised, the debtor given forty days to redeem after the time to redeem, the debtor filed a Petition asking that the appraisal be reviewed and the court find the true value of the property. The court denied the Petition and ordered the abandonment of the property. In that case the court said:

> "Appellant had forty days to redeem at the appraised value, but he did nothing. He sat for ninety days and did nothing. Then he came into court and asked the court to review the appraisal and if found incorrect that the court fix the true value of the property. There is even no charge that the appraisal was

> fundamentally erroneous. The most serious charge was that no hearing was had on the appraiser's report and that he had no opportunity to object to it. He had an opportunity to object when the report was lodged in court. He failed to make any objection during the forty day period fixed for redemption and for fifty days thereafter. Such dilatory tactics and delay may not be condoned."

Again in the case of in RE ADVOCATE C. C. H. Bankruptcy Law Service, No. 54, 519, August, 1943, D. C., N. Y., at pg. 55, 596, a motion by a bankrupt to be allowed to review a turnover order was denied because the court said the affidavit showed a plain and inexcusable delay in seeking a review without the presentation of any sound reason for the granting of the motion, and the court further said:

> "This is a motion where the delay of the bankrupt . . . is not only inexcusable but is one where the discretion of the court would be abused in granting it."

Examine the Petition of Peter J. Wumkes, has he excused his failure to see his attorney, note that he had moved to West Wood Village (T-105) which is West of Los Angeles, did he come to Redlands to consult with his attorney, had he given his attorney a correct address to write to? Apparently from the record the order staying proceedings and fixing rental was made in June, 1941 (T-68) and the matter was dormant thereafter. Is it not the duty of a client to keep his attorney and the court advised if he moves out of the city and the county? Can a party after receiving notice of a Federal hearing ignore the matter, negligently fail to seriously attempt to contact his attorney, have two continuances granted his attorney, and yet be said to

have exercised ordinary prudence or diligence and be innocent of negligence? Can he expect his attorney to obtain expert witnesses not knowing where his client was or his wishes and without any allegation or proof of the payment of cost to permit the attorney so to do?

We submit that such a Petition does not show accident or surprise, that the exercise of ordinary prudence could not have guarded against. Nor was he placed in such a position without negligence of his own. We, therefore, respectfully contend that the Honorable District Court erred in reversing the Commissioner's Order of May 18th, in that said Petition for said rehearing did not state sufficient facts to warrant the granting of a rehearing of said bankrupts' Petition, that there was insufficient evidence to justify his decision and that said decision was contrary to the law made and propounded for such matters.

THAT THE HONORABLE DISTRICT COURT ERRED IN REVERSING THE ORDER OF THE CONCILIATION COMMISSIONER MADE APRIL 9, 1943, DETERMINING THE VALUE OF CERTAIN PROPERTY.

Now considering the reversal of the Commissioner's Order of April 9th, determining the value of the property. An examination of the record clearly shows that four appraisers testified before the Debtor Powell as to the value of the property. Mr. Aubry, a licensed Real Estate Broker, Appraiser, and former District Manager of Farm Security Administration for Riverside and San Bernardino Counties, former land bank appraiser for Southern California, real estate broker appraising Citrus properties in San Bernardino, Riverside, Ventura, Orange and Los Angeles and other counties, having formerly appeared

before the Federal Court; Mr. W. H. Johnson, connected with Redlands Yucaipa Land Company for ten years, living in Redlands thirty-two years, with years of experience as an appraiser; G. D. Inman, Real Estate Broker since 1929 in Redlands; James Wheat, a former Postmaster of Redlands and engaged in the Real Estate business, all outstanding men, and the record shows that they took into account and described on the witness stand such various elements entering into the value of the property involved as its location, topography, soil formation and quality, existence of depreciating defects and blemishes, nature and condition of the improvements, etc., these being the factors particularly spoken of in the case of Equitable Life Assurance Society of the United States v. Carmody 131 Fed (2d) 318, that evidence of production was also introduced as in the case of in Re Alberti 41 Fed. Supp. 380, C. C. H. Bankruptcy Law Service No. 53, 429, at pg. 53, 677, decided by Judge Yankwich, but as in the Carmody case where the court said:

> "The situation here is hardly identical with that presented in Re Alberti where the court said 'This review presents the very simple question whether agricultural property can be appraised legally by taking into consideration one factor only, namely, productivity, under the use to which it is being put.' In the present case the witnesses for Appellant and those for the Debtor clashed sharply in their description and judgment of many of the value factors, such as the condition of the soil and the improvements, and the Conciliation Commissioner was, of course, required to resolve the question of credibility under the various elements detailed. He was entitled, however, to determine the fact as to each specific element, as he believed it to exist from

the testimony, and to use all of such facts, together with such light as he felt was soundly contributed by the varying arithmetical estimates of the witnesses in formulating his own judgment as to the actual market value of the property, and on the record before us, we cannot say, nor do we have any reason to believe that he was applying a false standard or criterion of market value, such as the court held had been done in the Alberti case."

THAT THE ORDERS OF THE CONCILIATION COMMISSIONER WERE MADE WITHIN HIS DISCRETION AND THAT THE HONORABLE DISTRICT COURT ERRED IN REVERSING SAID ORDERS.

Both of the Orders made by the Commissioner came within his discretion and the cases clearly point out that the court should not interfere with the trial court's discretion unless there is a gross abuse thereof. In the case of Dunsdon v. Federal Land Bank of St. Paul, C. C. H. Bankruptcy Law Service, 54, 445 at pg. 55, 531; 137 Fed (2d) 84, the court said:

> "It is the duty of the District Court to accept the Conciliation Commissioner's findings as to value, based upon a hearing, unless he is soundly convinced from the proceedings before him that it is clearly erroneous. Equitable Life Assurance Society of United States v. Carmody, 131 Fed. (2d) 318, 323. Again, in RAIT—Federal Land Bank of St. Paul, 135 Fed. (2d) 447, we emphasized that the value duly fixed upon a farmer's debtor's property, after a hearing of the Conciliation Commissioner, should not lightly be disturbed, and that the District Judge ought to proceed with a sound and conscientious restraint, before overturning it on review."

Again, in the Carmody case the court said:

> "In a proceeding of the character here involved, where there has been only a review of the previous record and no additional evidence has been received, the law clearly does not contemplate that a finding of the Conciliation Commissioner shall be set aside by a District Judge on a mere difference in personal judgment as to the crediting of the record evidence."

Certainly the Commissioner who heard the motion for a rehearing and also the testimony at the hearing determining value had a greater opportunity to judge the credibility of the witnesses and to determine not only value in the one instance but in the other instance, if a rehearing should have been granted because of surprise or accident, that the exercise of ordinary prudence and diligence could not have guarded against.

THE DISTRICT COURT ADMITTED AND CONSIDERED IMPROPER AND ILLEGAL EVIDENCE IN THE MAKING OF SAID DECISIONS, AND EACH OF THEM, TOWIT, THE ADMISSION OF OFFERS TO PURCHASE MADE BY ONE LOUIS A. TURNER, AND OFFERS OF JOHN CORCI, K. C. O'BRYAN, AND OTHERS. (T-113, 114, 115, 120).

The admissibility of offers of purchase has been considered by the court. Perhaps one of the leading cases is the case of Sharp v. United States, 191 U. S. 341; 48 Law. Ed. 211. There that court said:

> "Upon principle, we think the trial court was right in rejecting the evidence. It is, at most, a species of indirect evidence of the opinion of the person making such offer as to the value of the land. He may have so slight a knowledge on the subject as to render his

opinion of no value, and inadmissible for that reason. He may have wanted the land for some particular purpose disconnected from its value. Pure speculation may have induced it, a willingness to take chances that some new use of the land might, in the end prove profitable. There is no opportunity to cross-examine the person making the offer, to show these various facts. Again, it is of a nature entirely too uncertain, shadowy, and speculative to form any solid foundation for determining the value of the land which is sought to be taken in condemnation proceedings. If the offer were admissible, not only is it almost impossible to prove (if it exists) the lack of good faith in the person making the offer, but the circumstances of the parties at the time the offer was made as bearing upon the value of such offer may be very difficult, if not almost impossible to show. To be of the slightest value as evidence in any court, an offer must, of course, be an honest offer, made by an individual capable of forming a fair and intelligent judgment, really desirous of purchasing, entirely able to do so, and to give the amount of money mentioned in the offer, for otherwise the offer would be but a vain thing. Whether the owner himself, while declining the offer, really believed in the good faith of the party making it, and in his ability and desire to pay the amount offered, if such offer should be accepted, or whether the offer was regarded as a mere idle remark, not intended for acceptance, would also be material upon the question of the bona fides of the refusal . . . In our judgment they do not tend to show value, and they are unsatisfactory, easy of fabrication, and even dangerous in their character as evidence upon this subject . . . There is no chance to cross-examine as to the circumstances of the party making the offer in regard to good faith, etc."

In the case at bar, counsel not only criticized the Commissioner because he did not receive such an offer of purchase but the District Court likewise indicated that he felt that such testimony should have been admitted by the Commissioner at the time of the motion for rehearing and considered affidavits of offers of purchase at the time of the hearing in the District Court. This, we contend, was error for such evidence is inadmissible.

The Superior Court of California likewise determined this point, for in the case of the Central Pacific Railway Company of California v. Pearson, 35 Cal. 247 at pg. 262, the court said:

> "But, while the opinions of witnesses thus qualified by their knowledge of the subject are competent testimony, they cannot, upon the direct examination, be allowed to testify as to particular transactions, such as sales of adjoining lands, how much has been offered and refused for adjoining lands of like quality and location, or for the land in question, or any part thereof, or how much the company has been compelled to pay in other like cases—notwithstanding, those transactions may constitute the source of their knowledge. If this were allowed, the other side would have a right to controvert each transaction instanced by the witnesses, and investigate its merits, which would lead to as many side issues as transactions, and render the investigation interminable . . . Greenl. on Ev. Sect. 448"

CONCLUSION

May we, therefore, in closing, submit that this case while arising from the same Conciliation Commissioner is not similar in fact or in law to the case in RE ALBERTI Supra, which was decided by the Hon. Judge Yankwich and which he emphasized and referred to repeatedly in this case, that as in the Carmody case the evidence covered many elements other than productivity and the finding of the Commissioner was proper. That in addition, that certainly some duty and some responsibility is placed upon a party who receives a notice of the setting of a matter before a Federal Conciliation Commissioner, that party cannot be lax and dilatory and then expect the court to aid him and grant a rehearing of the case. We, therefore, respectfully urge that the Orders made by the Conciliation Commissioner were proper and should have been upheld by the District Court.

Respectfully submitted,

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Attorney for Appellants.